



JAMES WARREN SMITH JR.

COUNTY ATTORNEY
FRIO COUNTY

Id #15076
MBJ

RQ-363

February 21, 1992

RECEIVED

The Attorney General of Texas
Attn: Opinions Committee
Post Office Box 12548
Austin, Texas 78711-2548

FEB 25 92

Re: Request for attorney general's opinion
pursuant to Government Code, Sec. 402.043

Dear Sir:

I am requesting an attorney general's opinion pursuant to referenced statute.

I will present the question at issue, the applicable law and my conclusion.

THE QUESTION:

Does the Frio County Commissioners have the authority to promulgate regulations creating a "smoke-free" environment or designate restricted areas in county buildings or facilities for smoking?

APPLICABLE LAW:

The basic grant of authority for county commissioners courts is located in Texas Constitution, Article V, Sec. 18 which provides that a county's commissioners court shall "exercise such powers and jurisdiction over all county business "as is conferred by this Constitution and the laws of this State, or as may be hereafter prescribed."

Although I have found no statutes quite on point to this issue; there are two attorney general's opinions (i.e. Op. No. JM-737 [1987] and Op. No. JM-1098 [1989]) which address, respectively, the issues of municipal anti-smoking ordinance being applicable to "county facilities" and

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commissioners court's authority to regulate smoking in a county jail. There is also a Texas Penal Code statute (i.e. P.C. Sec. 48.01) making it:

"an offense to smoke tobacco in public primary and secondary schools, elevators, enclosed theaters, or movie houses, libraries, museums, hospitals, transit systems, buses or intrastate buses."

A third attorney general's opinion (i.e. Op. Atty. Gen. JM-737 [1987]) opines that a home-rule city's ordinance was not violative of any state law in its prohibiting smoking in public places.

With respect to the above-mentioned penal statute, reference is specifically made to Section 2 of the statute quoted in full as follows:

"The provisions of this Act shall not preempt any ordinance adopted by a governmental entity now or in the future which prohibits the possession of lighted tobacco products or prohibits the smoking of tobacco within the jurisdiction of said governmental entity."

CONCLUSION:

There is no express authority by our legislature authorizing the county commissioners court to regulate smoking in county facilities and buildings nor are there any cases or attorney general's opinions touching on this subject (see copy of note from Assistant Attorney General John W. Fuller, dated January 15, 1992, sent to one of the Frio County Commissioners.)

In David Brooks excellent treatise, 35 D. Brooks, County and Special District Law, Sec. 5.11 (pg. 152), the following is stated:

"The commissioners court does not need express statutory authority for each and every order which it makes so long as it is reasonably necessary to pursue some authority granted by either statute, or the state constitution." (underlining mine).

This writer maintains that authority is granted by Section (2) of Section 48.01 of the Texas Penal Code (see supra) to the county to adopt by ordinance the prohibition of "the possession of lighted tobacco within the jurisdiction of said

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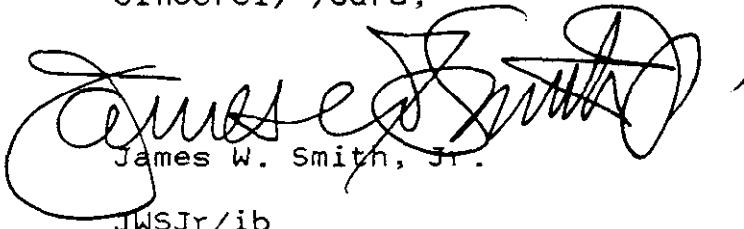
governmental entity."

Although it is arguable whether this is an "express" grant of authority for a commissioners court to regulate or prohibit the smoking of tobacco products within county facilities or buildings, one can conclude there is "implied" authority to do so as stated in the quote from Mr. Brooks' treatise, *supra*.

Analogous to the county's prohibiting smoking or regulating same in county facilities and buildings, cities are authorized as stated in Op. Atty. Gen. No. JM-737 (1987), *supra*, pursuant to V.A.C.S., art. 1175, to prohibit smoking in "public places" and the opinion concluded that this would, also, include county buildings.

Consequently the Frio County Commissioners Court would have implied authority to enforce an anti-smoking ordinance (or by ordinance restrict smoking to designated areas) in public buildings and facilities as authorized in Section 2 of Section 48.01 of the Texas Penal Code.

Sincerely yours,



James W. Smith, Jr.

JWSJr/ib

xc: Files

Encl: as stated

xc: The Hon. J.M. Lindsey, III. (w/o encl)
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